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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. .....

EMMA R. MOIST, individually and as assignee of Sidney M. Harvey and William T. McAlonan; LOUISE C. KUSHIGIAN, Administratrix of the Estate of Thermie K. Henkle, deceased; GEORGIANA S. WHITMAN, survivor of herself and Henry R. Whitman, deceased, and EVELYN M. SANDERS, Special Administratrix of the Estate of Muriel Miller, deceased,

Petitioners,

versus

BERNARD BELK, individually and as alleged "Receiver" of Brookdale Cemetery Association and Brookdale, Inc., alleged Michigan corporations, GEORGE LEWIS, individually and as survivor of himself and Daniel Lewis and Saul Lewis, both deceased, formerly co-partners doing business as Lewis Brothers and as Lewis Bros., Inc., Lewis Brothers Memorial Chapel, Daniel Lewis & Brothers, Lewis Bros. Funeral Directors, Inc., and Mt. Sinai Memorial Cemetery Association, CHARLOTTE L. KLINE, Administratrix of the Estate of Saul Lewis, deceased, NAOMI V. HILSEN and RICHARD E. MANNING, successor administrators, duly appointed of the Estate of Daniel Lewis, deceased, BROOKDALE CEMETERY ASSOCIATION, an alleged Michigan Rural Cemetery Association, BROOKDALE, INCORPORATED, an alleged Michigan Profit corporation, CONSTANTINE A. TSANGADAS, JOHN R. STARRS, STANLEY E. BEATTIE, RALPH W. McKENNEY, SYDNEY LIST, DAPHNE LIST, JAMES M. WIENNER, Administrator of the Estate of Harris W. Wienner, deceased, and DEPARTMENT OF COMMERCE, formerly Corporation and Securities Commission, of the State of Michigan,

Respondents.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Ralph W. McKenney, Guardian ad Litem, and one of the Respondents in the above entitled cause, respectfully objects to the Plaintiffs' Petition for Writ of Certiorari for the following reasons:

1. Leaving aside the personal abuse in the case for the moment, the core question is whether the Supreme Court of Michigan passed on the legal title to the cemetery here involved. The Plaintiffs' position is that the Michigan Supreme Court had no jurisdiction for certain technical reasons, despite its opinion in *Harvey, et al. v. Lewis et al.*, 357 Mich. 305, 98 N.W. 2d 599, and any decree of the Michigan Court would be void and therefore not binding, despite the fact that the land is admittedly in Michigan, and all parties in interest are Michigan residents, and there was personal service and jurisdiction. Plaintiffs filed in the Michigan Supreme Court a "Petition to Vacate Supreme Court Opinion Dated October 12th, 1959 (357 Mich. 305) and Decree Dated December 8th, 1959, for Want of Jurisdiction." This Petition To Vacate was denied on November 24th, 1959 as appears in the preamble to the Michigan Supreme Court decision. All of Plaintiffs' contentions were overruled in this case, and admittedly certiorari was never taken therefrom. Plaintiffs' position is that they can now commence the case *ab initio* again in the Federal District Court at Detroit. The rule requires printing of all opinions below in the Petition for Certiorari, (which was not done in this case as the Federal District

Court opinion is omitted). However, to show this Honorable Court, the awareness of these plaintiffs that the proper remedy was certiorari, from the decision of the Michigan Supreme Court, the following, from the opinion of the Federal District Court is printed. At pages 2-4 of the District Court's opinion, the following appears:

> "Plaintiffs' counsel also conceded certain other matters on the record at the December 12 hearing. He stated that his clients had been represented by counsel of their choice during the entire State court proceedings and that they did fail to seek review of the allegedly void 1959 Michigan Supreme Court decision by application to the United States Supreme Court. This failure to seek such review was knowing and deliberate on the part of plaintiffs inasmuch as they were aware then of the same Constitutional issues which they are raising herein, and were advised by their present counsel to seek such ultimate review of the alleged violation of their constitutional rights which they are challenging herein.[2] Furthermore, plaintiffs' counsel also stated that each and every issue which plaintiffs are raising herein was formally raised in the State Court proceedings or could have been raised therein if plaintiffs' counsel had wished to do so.[3]
>
> These facts and circumstances describe the classic situation for the application of the doctrine of *res judicata*. Perhaps the most compelling reason for the use of this doctrine is to bring an eventual end to litigation, so that in the orderly course of judicial administration, issues once litigated and controversies once resolved may not be subsequently reopened. It appears to the court that this is precisely what plaintiffs are attempting to do in this cause, to relitigate claims which have already been decided by the State courts of competent jurisdiction adversely to plaintiffs. Whether, as plaintiffs claim, the 1959 Michigan Supreme Court decision denied them equal protection of the law by incorrectly applying State law is not before the court

at this time. If such decision violated plaintiffs' constitutional rights their only relief would have been to seek direct review in the United States Supreme Court. This procedure they deliberately waived. They cannot now be heard anew on this same claim in federal district court. As the court pointed out in *Rhodes v. Meyer,* 334 F. 2d 709 (8th Cir. 1964), cert. denied 379 U. S. 915 (1964), the Civil Rights Act was not intended to allow persons knowledgeable in legal procedures to ignore an opportunity to correct an alleged error and then, in subsequent proceedings, attack the administration of justice."

Footnotes 2 and 3 cited from the Federal District opinion are quoted below:

"2. Plaintiffs' present counsel informed the court on the record at the December 12 hearing that he had carefully followed and studied the State court proceedings as they progressed because of his great interest in the issues raised therein. Although he stated he had no formal connection with the case at the time of the 1959 Michigan Supreme Court decision, he nevertheless was of the opinion that the decision was unconstitutional and he urged counsel representing plaintiffs at that time to appeal the decision to the United States Supreme Court. Plaintiffs' failure to heed such advice is unexplained on this record, but it is clear that their counsel had been so advised and could have sought such review if he had considered it in his clients' best interests.

3. Plaintifffs' petition for rehearing, formally entitled 'motion to vacate', filed in the Michigan Supreme Court subsequent to its 1959 decision, raised the constitutional issues of denial of due process and equal protection."

In the course of the argument before the District Court, Plaintiffs asserted this matter had only been appealed twenty-two (22) times instead of thirty-nine (39) times as the Defendants claimed, but in any case, it would seem to have been extremely well litigated, and that Plaintiffs have more than had their "day in court".

2. While it is submitted that matter is fully covered by the doctrine of *res judicata*, the District Judge agreed with Defendants that for other reasons, the case should have been dismissed, saying at page 5 of the District Court opinion that counsel failed to comply with Fed. R. Civ. Proc. 8(a).

> "In view of the foregoing, it is not necessary to rule on the various other grounds urged in the motions under consideration herein. However, one word might be said with regard to the nature of plaintiffs' complaint which was objected to on the grounds that it failed to comply with Fed. R. Civ. Proc. 8(a). This rule requires a complaint to state 'a short and plain statement of the claim showing that pleader is entitled to relief.' Plaintiff's original complaint consists of ninety-four pages, atttached to which are sixty-three exhibits and a subsequently filed amended complaint imposes an additional ten pages thereto. The court agrees that the dismissal of the complaint, as amended, would be proper, as was done in the similar case of *Corcoran v. Yorty*, 347 F. 2d 222 (9th Cir. 1965), for the reason that the complaint is 'so verbose, confused and redundant that its true substance, if any, is well disguised.' At 223. However, in the interests of an expeditious determination of this action, and in view of plaintiffs' counsel's statements on the record, referred to above, as to the true nature of his claim the court has undertaken herein to decide the matter on the merits."

3. In a case of this character, replete with personal abuse, vituperation, and insults to the Michigan judiciary, it is respectfully submitted that it is not a case deserving of the time and attention of the highest Court of the land.

4. As to this particular defendant, the guardian ad litem, his pleadings included special defenses not available to all of the Defendants.

The Michigan Supreme Court in litigation directly between these plaintiffs, and Ralph W. McKenney, this guardian ad litem, passed on the guardian ad litem's fees, in *Harvey, et al. v. Lewis, et al.,* Claim of McKenney, Guardian, 365 Mich. 159, 112 N.W. 2d 73. In that particular case, all manner of charges of fraud and conspiracy were levelled against this guardian ad litem and rejected by the Supreme Court unanimously. One of the Judges concurring specially in the result listed as of that time (1961) twenty-one (21) appeals and there have been others since that date. Also see the related case of *Harvey v. Lewis,* 363 Mich. 232, at 235 (1961), 109 N.W. 2d 143, wherein the Michigan Court said:

> "PER CURIAM. On motion of the Court, the briefs and appendices of plaintiffs-appellants Harvey et al., in the above-styled matters are stricken for gross violations of Court Rule No. 67 (particularly sections 1, 2 and 7 thereof).
>
> Further, under authority of Court Rule No. 70, §5(b), the appeals of plaintiffs-appellants Harvey, et al., will be dismissed 60 days from date unless by then appellants have filed briefs and appendices complying with appellate rules."

In the motion before the Federal District Court at Detroit for Summary Judgment in behalf of this guardian ad litem, a lengthy printed brief in the Michigan Supreme Court alleging all manner of evil doing by this guardian ad litem was attached, showing all of these relevant litigated matters. Without reprinting the whole of Plaintiffs'

brief, the following from it, which are the only "Statement of Questions Involved" is reproduced here to show that these matters, too, were litigated in the Michigan Supreme Court.

> "1. Do prejudice, partiality, 'adversary' and unauthorized activities of an attorney who accepted an appointment as 'guardian ad litem' both disqualify him and defeat his right to compensation for alleged services?
>
> The Successor Judge answered, 'No.'
> Plaintiffs-Appellants insist the answer should be, 'Yes.'
>
> 2. Does the fact that an attorney who was appointed 'guardian ad litem,' who in ignorance of the contents of the file joined in Successor Trial Court reversal and dismemberment of the Trial Judge's Opinion without retrying or taking testimony on the heart and core thereof and who failed to perform the normal duties of a 'guardian ad litem', but without authority indulged in activities adverse to parties to the suit, defeat or affect the amount to be allowed to said attorney on his claim for services?
>
> The Successor Judge answered, 'No'.
> Plaintiffs-Appellants insist the answer should be, 'Yes'.
>
> 3. Does misrepresentation of the purpose of the appointment of an attorney as 'guardian ad litem' and of his purpose acting under such appointment affect both the validity of said appointment and defeat or affect the amount to be allowed to said attorney on his claim for services as such?
>
> The Successor Judge answered, 'No'.
> Plaintiffs-Appellants insist the answer should be, 'Yes'.

4. Does the insertion in an Appendix of a wholly irrelevant contingent agreement under the false claim that it was a 70% fee agreement when it was on its face less than 45%, without showing or giving notice that there was a Final Decree establishing its propriety and validity, defeat or affect the amount to be allowed to an attorney acting adversarily under an appointment as 'guardian ad litem' for his services?

The Successor Judge answered, 'No'.
Plaintiffs-Appellants insist the answer should be, 'Yes'."

5. A Motion to Dismiss Appeal in the Circuit Court for the Sixth Circuit was filed by this respondent, pointing out, among other things, that in addition to the Judgment of the District Court applying to each and every defendant, that as to Ralph W. McKenney, Constantine A. Tsangadas, and John R. Starrs, a Summary Judgment had been ordered by the District Court on December 22, 1966, in their favor, which was cumulative to the regular judgment applying to all defendants. By Order dated February 10 1967, the Federal District Judge ordered the clerk to enter separate Summary Judgments in favor of these named defendants Nunc Pro Tunc as of December 22, 1966. A true copy of this Order is attached marked Appendix A. This Order was attached to this respondent's Motion to Dismiss Appeal in the Sixth Circuit Court of Appeals, marked in that Motion as Exhibit 6. A copy of the Proof of Service of the Petition for Order Directing Clerk to Enter a Summary Judgment and Proof of Service of the Order directing Clerk (Federal Court) to enter a Summary Judgment forthwith but Nunc Pro Tunc is attached hereto, being marked Appendix B and was Exhibit 7 in the aforesaid Motion to Dismiss Appeal in the Circuit Court for the Sixth Circuit.

A copy of the Calendar Entries is attached hereto, being marked Appendix C, and was marked Exhibit 8 in the aforesaid Motion to Dismiss Appeal in the Circuit Court of Appeals.

6. No appeal from the Trial Court's "Order Directing Clerk to Enter Summary Judgments Forthwith but Nunc Pro Tunc, as of December 22, 1966" dated February 10 1967, was ever taken, and the time to appeal has long since expired.

7. The Petition for Writ of Certiorari, at page 12, clearly shows the appeal is only from the December 22, 1966 judgment or order on the respondents' motions to dismiss, and has nothing to do with appealing from the granting of the summary judgment. Petitioners statement is as follows:

> "On December 22, 1966 the District Court granted the motion of defendants to dismiss the complaint filed herein before answer and trial (R. 242a-253a) and plaintiffs subsequently perfected an appeal from the orders."

Therefore, this Petition for Certiorari is not timely and the Summary Judgments stand unchallenged and are grounds, in addition to the other reasons for dismissal of the Petition for Certiorari.

In the body of the Plaintiffs' brief in that case, (the complete brief of which was included in the Motion for Summary Judgment in the Federal District Court), extremely defamatory material was alleged and falseness of it rebutted in this guardian ad litem's brief filed in the case determined in the Michigan Supreme Court, as to the guardian ad litem's fees. All of this was passed on by the

Michigan Supreme Court, which by its holding in the guardian ad litem fee case, 365 Mich. 159, 112 N.W. 2d 173, denied plaintiffs' unfounded, untrue and scandalous claims. Plaintiff's brief was replete with allegations of conspiracy by the guardian ad litem, partiality, and fraud, (none of which was true), but which is here referred to in order to show the full measure of *res judicata*.

WHEREFORE, it is respectfully prayed that Plaintiffs' Petition for Writ of Certiorari be denied.

Respectfully submitted,

.....

RALPH W. McKENNEY,
Guardian Ad Litem,
In Propria Persona,
2526 Buhl Building,
Detroit, Michigan 48226.

Dated: September 27, 1967.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Emma R. Moist, etc. et al., Plaintiffs, v. Bernard Belk, etc., George Lewis, etc., Charlotte L. Kline, etc., Naomi V. Hilsen and Richard E. Manning, etc., Brookdale Cemetery Association, etc., Brookdale, Inc., etc., Constantine A. Tsangadas, John R. Starrs, Stanley E. Beattie, Ralph W. McKenney, Sydney List, Daphne List, James M. Wienner, etc. and Department of Commerce of the State of Michigan, Defendants.	Civil Action 29,165

ORDER DIRECTING CLERK TO ENTER SUMMARY JUDGMENTS FORTHWITH BUT NUNC PRO TUNC AS OF DECEMBER 22, 1966

At a session of said Court held in the Federal Building, Detroit, Michigan on February 10, 1967.

Present: Honorable Thaddeus M. Machrowicz, District Judge.

On reading and filing the petition of Constantine A. Tsangadas, John R. Starrs and Ralph W. McKenney for entry of summary judgments in their favor in this cause, as ordered by this Court on December 22, 1966, and it appearing that the clerk has not heretofore entered such judgments under Rule 58, as amended,

It is hereby ordered that, pursuant to Rule 58 as amended, the Clerk of this Court forthwith, but nunc pro tunc as of December 22, 1966, enter separate summary judgments in favor of each of the petitioners, Constantine A. Tsandas, John R. Starrs and Ralph W. McKenney, and against plaintiffs.

Thaddeus M. Machrowicz,
District Judge.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Emma R. Moist, et al.,
Plaintiffs,

v.

Bernard Belk, etc., George Lewis, etc., Charlotte L. Kline, etc., Naomi V. Hilsen and Richard E. Manning, etc., Brookdale Cemetery Association, etc., Brookdale, Inc., etc., Constantine A. Tsangadas, John R. Starrs, Stanley E. Beattie, Ralph W. McKenney, Sydney List, Daphne List, James M. Wienner, etc. and Department of Commerce of the State of Michigan,
Defendants.

Civil Action
29,165

PROOF OF SERVICE

State of Michigan,
County of Wayne—ss.

C. A. Tsangadas, being first duly sworn, deposes and says that on the 11th day of February, 1967 he served a copy of the Petition for Order directing Clerk to enter Judgment pursuant to Rule 58, Nunc Pro Tunc as of December 22, 1966, and a copy of the Order directing Clerk to enter a Summary Judgment forthwith but Nunc Pro Tunc as of December 22, 1966, on August F. Brandt, Attorney for Plaintiffs, 383 St. Clair Avenue, Grosse Pointe,

Michigan; on Albert Sugar, Attorney for Belk, 950 Guardian Building, Detroit 26, Michigan; on Arthur Lang, Attorney for Lewis, 1725 First National Building, Detroit, Michigan; William Rudell, for Attorney General, 1900 Cadillac Square Building, Detroit 26, Michigan; on James M. Wienner, 3110 Guardian Building, Detroit 26, Michigan; on Sydney List, 10345 Freeland Avenue, Detroit 35, Michigan, by depositing the same in the United States Mail with postage fully prepaid, and on Wm. Cooney, Union Guardian Building, Detroit Michigan.

And further deponent saith not.

C. A. Tsangadas.

Subscribed and sworn to before me, this 11th day of February, A.D., 1967.

/s/ John C. Coots,

Notary Public, Wayne County, Michigan.
My commission expires March 30, 1969.

APPENDIX C

(Civil Action 29,165)

DOCKET ENTRIES

1966

Nov. 9. Complaint with attached exhibits, filed—summons issued.

Nov. 9. Motion for preliminary injunction with supporting briefs, filed, hearing Nov. 21, 1966.

Nov. 14. Motion of Estate of Daniel Lewis, deceased, Jean K. Lewis and George Lewis to dismiss with exhibit, filed, hearing Nov. 21, 1966.

Nov. 14. Motion and temporary restraining order, filed and entered; Machrowicz, J.

Nov. 18. Answer to motion for preliminary injunction and temporary restraining order, filed.

Nov. 18. Motion to dismiss, filed, hearing Nov. 21, 1966.

Nov. 18. Summons filed.

Nov. 18. Motion for preliminary injunction and motion to dismiss heard and adj. to Nov. 28, 1966.

Nov. 21. Marshal's return of summons, etc., filed.

Nov. 21. Proof of service, filed.

Nov. 21. Plaintiffs' response and brief in opposition to motion to dismiss by defendants George Lewis and estates of Daniel Lewis and Saul Lewis, both deceased, filed.

Nov. 22. Notice of amended complaint, filed.

Nov. 23. Proof of service, filed.

Nov. 23. Proof of service, filed.

Nov. 25. Marshal's return of order and motion, filed.

Nov. 28. Motion for preliminary injunction adj. to Nov. 29, 1966, Machrowicz, J.

Nov. 29. Affidavit of Edward M. Babcock, filed.

Nov. 29. Order dissolving temporary restraining order and denying motion for preliminary injunction, filed, Machrowicz, J.

Nov. 30. Summons filed.

Nov. 30. Motion of Stanley E. Beattie to dismiss with supporting affidavit, brief and proof of service, filed, hearing Dec. 12, 1966.

Dec. 1. Motion of defendant Starrs to dismiss and motion for summary judgment with supporting brief, exhibits and proof of service, filed, hearing Dec. 12, 1966.

Dec. 2. Motion of Constantine A. Tsangadas to dismiss and summary judgment with supporting memorandum and proof of service, filed, hearing Dec. 12, 1966.

Dec. 2. Motion of Sydney and Daphne List to dismiss with supporting brief, filed, hearing Dec. 12, 1966.

Dec. 2. Motion of Ralph W. McKenney to dismiss with supporting brief and proof of service, filed.

Dec. 5. Motion of James M. Weinner to dismiss, filed, hearing Dec. 12, 1966.

Dec. 6. Proof of service, filed.

Dec. 12. Motions to dismiss heard and taken under advisement.

Dec. 15. Appearance of Department of Commerce, formerly Corporation & Securities Commission, filed.

Dec. 22. Transcript of Dec. 12, 1966, filed.

Dec. 22. Memorandum opinion and order granting motions to dismiss and motions for summary judgment with prejudice, filed and entered, Machrowicz, J.

Dec. 23. Order granting motion to dismiss cause as to the Estate of Daniel Lewis, deceased, Jean K. Lewis, and George Lewis, defendants, with prejudice, filed and entered, Machrowicz, J.

Dec. 23. Proof of mailing, filed.

Dec. 27. Notice of entry mailed.

1967

Jan. 3. Order dismissing cause and discharging lis pendens as to Bernard Belk, individually and as Receiver for Brookdale Cemetery Association, with costs to be taxed in favor of Bernard Belk, filed and entered, Machrowicz, J.

Jan. 18. Plaintiffs' notice of appeal, filed.

Jan. 18. Plaintiffs' appeal bond in cash of $250.00—Receipt No. 43394.

Jan. 23. Motion and order extending time to file and docket record on appeal to Apr. 18, 1967, filed and entered, Machrowicz, J.

Jan. 23. Letter to attorneys re: appeal, filed.

Jan. 23. Proof of mailing filed.

Jan. 23. Proof of service, filed.

Feb. 7. Motion of Estate of Daniel L. Lewis, deceased, Jean K. Lewis and George Lewis for security for costs and proof of service, filed, hearing Feb. 13, 1967.

Feb. 7. Motion of Stanley E. Beattie for security for costs with proof of service filed, hearing Feb. 13, 1967.

Feb. 9. Petition for order directing Clerk to enter judgment pursuant to rule 58, nunc pro tunc as of Dec. 22, 1966, filed.

Feb. 10. Order directing Clerk to enter summary judgments forthwith but nunc pro tunc as of Dec. 22, 1966, filed and entered, Machrowicz, J.

Feb. 10. Clerk's judgment on decision by the Court as to defendants John R. Starrs, Ralph W. McKenney and Constantine A. Tsangadas that plaintiffs take nothing and that said defendants recover costs—entered nunc pro tunc as of Dec. 22, 1966, filed.

Feb. 13. Proof of service, filed.

Feb. 13. Motion for security for costs with affidavit of service, filed, hearing March 6, 1967.

Mar. 6. Motion for security for costs heard and granted —plaintiffs to file $1,000.00 for each defendant a total of $9,000.00—order to be entered, Machrowicz, J.

Mar. 9. Order for security for costs, filed and entered, Machrowicz, J.

Mar. 13. Proof of service of order for security for costs, filed.

Mar. 15. Motion of Bernard Belk for security for costs and for supersedeas bond with supporting brief and proof of service, filed, hearing Mar. 20, 1967.

Mar. 16. Response to motion of defendant Bernard Belk for security for costs for supersedeas bond and supporting brief, filed.

Mar. 20. Motion for security for costs, etc., adj. to Mar. 27, 1967, Machrowicz, J.

Mar. 21. Notice of filing security for costs, filed.

Mar. 21. Security bond for costs in $9,000.00, filed, Fidelity and Deposit Co. of Maryland, surety.

Mar. 27. Motion for security for costs and for supersedeas bond by defendant Bernard Belk heard and denied, Machrowicz, J.

Mar. 31. Opinion re: receiver's motion for security for costs and supersedeas bond, filed and entered, Machrowicz, J.

Mar. 31. Order denying receiver's motion for security for costs and for supersedeas bond, filed and entered, Machrowicz, J.

Mar. 31. Proof of mailing, filed.

Apr. 10. Order of CCA re: oral argument at Cincinnati, Ohio, Apr. 19, 1967 and as to briefs, filed.

Apr. 19. Acknowledgment filed.